

**A BINTULU ADHESIVES & CHEMICALS SDN BHD v. AL ASIA
CHEMICAL INDUSTRY SDN BHD**

HIGH COURT SABAH & SARAWAK, BINTULU
DUNCAN SIKODOL JC

[CIVIL APPEAL NO: BTU-12A-2-11-2021]

31 MARCH 2022

Abstract – *Based on emails exchanged between the parties involved, there was a clear admission that the defendant owed the plaintiff an outstanding amount as claimed by the latter and that it would settle the same. As these admissions were binding against the defendant, the plaintiff's application to enter judgment on admission of facts under O. 27 r. 3 of the Rules of Court 2012 ought to be allowed.*

CIVIL PROCEDURE: Judgment – Admission – Application to enter judgment on admission of facts – Email exchanged between parties showed defendant made unequivocal admission of claims by plaintiff – Whether admissions binding against defendant – Whether plaintiff entitled to its claim by way of judgment on admission of facts – Rules of Court 2012, O. 27 r. 3

This was the plaintiff's appeal against the decision of the Sessions Court Judge who dismissed its application to enter judgment on admission of facts under O. 27 r. 3 of the Rules of Court 2012 ('ROC'). The plaintiff and the defendant had entered into a contract for the purchase of Urea Formaldehyde Concentrate ('UFC-85'). However, after the conclusion of the transaction, a dispute arose between the parties regarding the respective parties' performance of their obligations under the contract. The plaintiff argued that they had fulfilled their end of the bargain to supply UFC-85, as agreed, to the defendant and was therefore entitled to the payment for the performance of the contract. The defendant, on the other hand, argued that even though the plaintiff had supplied the UFC-85, it was not done in accordance with the terms that had been agreed in their contract. Despite requests for payments, the defendant failed to pay the balance sum. This led to the plaintiff filing the instant suit to recover the amount of RM542,660.53. The defendant filed its defence to the suit. The plaintiff then proceeded to apply for judgment on admission of facts under O. 27 r. 3 of the ROC based on an email from the defendant exhibited under 'JT15' admitting the outstanding amount and that they would settle the same, which was dismissed by the Sessions Court. Hence, this appeal. The issue to be decided was whether the plaintiff was entitled to its claim by way of judgment on admission of facts.

Held (allowing appeal; setting aside order of Sessions Court):

- (1) The showed that the defendant, in response to the plaintiff's request for payment exhibited under 'JT13', admitted in 'JT15' that it was facing financial difficulties due to some issues with its overseas customers and

the current pandemic. However, the defendant stated that it would work out a financial plan to settle the outstanding sum due to the plaintiff. Based on the defendant's response, there was a clear admission of all that they still owed the plaintiff the outstanding amount as claimed and not simply evidence of some facts upon which the plaintiff relied on to establish their cause of action. As there was no requirement of admissions to be pleaded, those admissions as per in their email was therefore binding against the defendant. (para 29)

- (2) The defendant's averment that the communication under 'JT15' was a 'without prejudice' communication was without merit as it was not expressly or by inference stated as such in the said email as required under s. 23 of the Evidence Act 1950. It was noted that the said admission was not part of a negotiation process between the parties but rather it was made in pursuance to the plaintiff's request for payment. Therefore, when this issue arose for the first time in the defendant's affidavit in opposition after the legal action was commenced against the defendant, it smacked as an afterthought. Therefore, this contention was an afterthought. (para 30)

- (3) Although the defendant had raised various issues in the defendant's defence and/or counterclaim, those issues fell under 'any other issues between the parties' for the purpose of O. 27 r. 3 of the ROC. For those issues, the court may give such judgment as the court thinks just without waiting for the determination of any question between the parties. Any other issues raised in the defendant's counterclaim were to be determined separately. Based on the affidavit evidences, the defendant had made an unequivocal admission of the claims by the plaintiff. (paras 31 & 32)

Case(s) referred to:

Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd & Ors [1988] 1 LNS 88 (*refd*)

Folin & Brothers Sdn Bhd (In Receivership) v. Wong Foh Ling & Ors [1991] 1 CLJ 743; [1991] 2 CLJ (Rep) 609 HC (*refd*)

Low Yoke Lan v. Ng Ooi Kiat [2001] 1 LNS 338 HC (*refd*)

Ong Gim Huat v. Toh Suan Lin Amy [1992] 1 LNS 40 HC (*refd*)

Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah [1995] 3 CLJ 610 HC (*refd*)

Vithal Kumar Jayaraman v. Azman Md Nor [2010] 3 CLJ 332 CA (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 29

Evidence Act 1950, s. 23

Rules of Court 2012, O. 27 r. 3, O. 55 r. 2

Rules of the High Court 1980, O. 27 r. 3

For the appellant - Cecil Lau; M/s Jaini Robert & Lau Advocs

For the respondent - Unrepresented

Reported by Suhainah Wahiduddin

A

JUDGMENT

Duncan Sikodol JC:

B [1] This appeal is brought by the plaintiff against the decision of the learned Sessions Court Judge Bintulu, who on the 9 November 2021 dismissed its application to enter judgment on admission of facts under O. 27 r. 3 ROC 2012.

[2] For convenience, the parties will be referred to as they were in the court below.

C [3] The relevant cause paper/documents for this appeal are as follows:

(i) notice of appeal (encl. 1);

(ii) record of appeal (encl. 2);

(iii) supplementary record of appeal (encl. 3);

D (iv) supplementary record of appeal (2) (encl. 5); and

(v) notice of application withdrawal of solicitor (encl. 6).

Background Facts

E [4] The plaintiff and the defendant in this case had entered into a contract for the purchase of urea formaldehyde concentrate (“UFC-85”) on the following terms:

(i) that the plaintiff is to supply UFC-85 to the defendant;

F (ii) that the plaintiff is to source used IBC tanks for purposes of storing UFC-85;

(iii) that the plaintiff is to handle the shipping and purchase of the IBC tanks;

(iv) that the plaintiff is to clean the IBC tanks prior to storing the UFC-85 in the same;

G (v) that the plaintiff is to load the UFC-85 in the IBC tanks into the containers in a safe and proper manner that is arranged by the defendant’s forwarding agent.

H [5] In this regard, the UFC-85 were to be shipped by the plaintiff from Bintulu International Container Terminal, Sarawak to Onne Port Terminal, Nigeria.

I [6] However, after the conclusion of the transaction, a dispute arose between the parties regarding the respective parties’ performance of their obligation under the contract. The plaintiff argued that they have fulfilled their end of the bargain to supply the UFC-85 as agreed to defendant and

therefore entitled to the payment for the performance of the contract. The defendant on the other hand argued that even though the plaintiff has supplied the UFC-85, it was not done in accordance with the terms that have been agreed in their contract. A

[7] Despite repeated requests for payments, the defendant failed to pay the balance sum. This led to the plaintiff filing the instant suit to recover the amount of RM542,660.53. B

[8] The defendant having filed its defence to the suit, the plaintiff then proceeded to apply for judgment on admission of facts under O. 27 r. 3 of the Rules of Court 2012 based on an email from the defendant exhibited under "J15" admitting the outstanding amount and that they would settle the same. C

[9] On the 9 November 2021, the learned Sessions Court dismissed the plaintiff's application. Hence, this appeal. D

Applicable Laws

[10] Order 27 r. 3 of the ROC 2012 deals with judgment on admission of facts. It reads as follows:

(1) Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may give such judgment, or make such order, on the application as it thinks just. E

(2) An application for an order under this rule shall be made by a notice of application. F

[11] The object of the above rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim. See *Low Yoke Lan v. Ng Ooi Kiat* [2001] 1 LNS 338; [2001] 4 AMR 4781. G

[12] This rule relates to the admissions of fact, whether in the pleadings or otherwise. The admission must be clear admission, and not a simple evidence on some facts upon which the plaintiff would have to rely to establish his cause of action. Therefore, where the plaintiff made an allegation of partnership which is disputed by the defendant, it is impossible for the court to give judgment on the alleged admission of partnership. See *Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd & Ors* [1988] 1 LNS 88; [1988] 3 MLJ 271 at p. 272. H

[13] Admission of facts maybe expressed or implied but they must be clear. Where the facts and rebuttals show that an admission was not clear, the court would not invoke O. 27 r. 3. See *Ong Gim Huat v. Toh Suan Lin Amy* [1992] I

- A 1 LNS 40; [1992] 2 MLJ 610 at p. 614. In other words, the court will only allow judgment to be entered under O. 27 r. 3 if there is an unequivocal admission of fact which entitles the plaintiff to enter judgment against the defendant. See also *Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332; [2010] 2 MLJ 67 where the court held that the admission must be a clear admission of all, and not simply evidence of some facts upon which the plaintiff would have to rely to establish his cause of action.
- B

- [14] The said admissions are not confined to admissions contained in the pleadings alone. In *Folin & Brothers Sdn Bhd (In Receivership) v. Wong Foh Ling & Ors* [1991] 1 CLJ 743; [1991] 2 CLJ (Rep) 609, Zakaria Yatim J held that under O. 27 r. 3 of the RHC 1980, admissions may be made in the pleadings or otherwise, the word 'or otherwise' including an admission made by letter stating facts which show the defendant has no defence to the action.
- C

- [15] In *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610, Low Hop Bing J went on to stress that the failure to plead the admission is not fatal; and hence it is not essential that an admission, which relates to and is governed by the rules of evidence, be pleaded.
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Analysis And Findings

- [16] The issue to be decided in this appeal will be whether the plaintiff is entitled to its claim by way of judgment on admission of facts. In considering the above, I am mindful that pursuant to s. 29 of the CJA 1964 and O. 55 r. 2 of the ROC 2012, this appeal is by way of rehearing and not a review of the decision.
- E

- [17] In determining the issue, the court has to decide whether the defendant's email dated 1 June 2020 in response to the plaintiff's request for payment amounted to a clear unequivocal admission of fact.
- F

[18] The claim of the plaintiff which are undisputed arises from the following facts:

- G [19] Pursuant to two purchase orders, the defendant requested the plaintiff to supply goods to the value of RM943,000.03.

First Order

- [20] For this order, the defendant in November 2019 ordered UFC-85 and used empty tanks. The plaintiff filled UFC-85 into 396 used IBC tanks and loaded into 22 containers. In the defendant's purchase order, it is specified that the defendant is given 30 days to pay for the UFC-85 and the tanks.
- H

- [21] During the loading of the above goods, the defendant's representatives one Alex Wong and one Nathan were at the plaintiff's factory observing the loading process.
- I

[22] For this order, the defendant has already made partial payment in the sum of RM400,339.50 to the plaintiff on the 2 March 2020 leaving a balance of RM238,160.50. A

Second Order

[23] In respect of this order, the defendant in February 2020 issued another purchase order for the purchase of UFC-85 and used IBC tanks which involved UFC-85 filled into 90 used tanks loaded into five containers. B

[24] On the 18 March 2020, one Nathan from the defendant had informed that the defendant has completed unloading the goods as shown in exh. 'JT12'. C

[25] For the second order, the invoice for the UFC-85 is RM154,445.63 whereas the invoice for the used IBC tanks is RM23,850. These invoices remain unpaid.

[26] When requested by the plaintiff by way of letter dated 10 February 2020 as shown in exh. "JT14" for the balances of the first order as well as the second order to be paid, the defendant admitted to the amount due for the first order in November 2019. D

[27] With regards to the second order, the defendant in response to the plaintiff's request for payment exhibited under "JT13" dated 1 June 2020 of the outstanding total of RM542,660.53 replied *via* email as exhibited under "JT15" that they would settle the outstanding amount. E

[28] For clarity, the said email ("JT13 and JT15") is reproduced below:

Exhibit "JT13"

From: BAC BAC [mailto:bacbtu@gmail.com]
Sent: 30 May 2020 14:17
To: Alexwong_Al Asia <alexwong@alasiachemical.com>
Subject: Long Overdue Outstanding Accounts

Dear Alex

We refer to the numerous emails, telephone conversations and WhatsApp messages with you on the long overdue outstanding accounts. You verbally agreed that you would settle all the outstanding accounts amounting to RM542,660.53 by end of May 2020. Details are as follows:

- | | | |
|---|--------------------|---|
| (a) Balance of invoice no.: BAC/0432/19
dated 26th November 2019 | RM238,160.50 | H |
| (b) Invoice no.: BAC/M160/19
dated 27th November 2019 | RM126,204.40 | |
| (c) Invoice no.: BAC/0069/03/20
dated 2nd March 2020 | RM154,445.63 | I |

A (d) Invoice no.: BAC/M027
dated 13th March 2020 RM23,850.00

Total **RM542,660.53**

B Despite all your assurance and promise, you did not keep to your promise to pay the outstanding accounts by end of May 2020. We hereby giving you until 7th June 2020 to settle all the outstanding accounts. Failing which we have no choice but to institute legal action against you to recover the debt.

Your prompt and serious attention on this is highly appreciated.
Thanks and regards
C James Tang
BAC

Exhibit "JT15"

From: lisayu@alasiachemical.com [mailto: alasiachemical.com]
Sent: Monday, June 01, 2020 3:32 PM
D **To:** 'BAC BAC'
Cc: 'Alexwong_AI Asia'
Subject: Long Overdue Outstanding Accounts

Dear Mdm Chua/Mr Tang,

E Extremely sorry for our late reply.

I was busy and was in the hospital for the past few weeks.

I am terribly sorry for not being able to answers you on-time.

F With regards to the payment, we are just back to work and settling some hiccups here and there. And the same towards our customers in overseas.

The current pandemic situation creates lots of challenges to us and I would request you to give us some more time to provide you the payment plan.

G Currently, we are also still waiting for the confirmed schedule from our customers. A temporary financial aid is also in the progress, and we are expecting it by this month.

I understand the urgency and the concerns about the dues, but please allow us sometimes till we get the funds and financial aid confirmed and we shall give you a more realistic schedule.

H Please hold for any legal action until we come back to you by this month as any actions taken towards us will affect the financial aids and will prolong the issues.

We regret to have caused so much of inconvenient to you and your team.

I We will update you again by mid of Jun with the payment schedule progress.

We are planning to allocate some funds like the first RM200K-RM300K by Jun and the rest to be settled within 2-3 months later. However, this will be confirmed once we got all of the above finalized.

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We request you to please bear with us.

Highly appreciate for your kind understanding.

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Please do not hesitate to contact us should you require further information.

Best Regards,

Ms Lisa

C



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We are ISO22000, ISO 9001:2015, and GMP certified company

[29] Based on the above email, it shows that the defendant in response to the plaintiff's request for payment exhibited under "JT13" admitted in "JT15" that it was facing financial difficulties due to some issues with its overseas customers and the current pandemic. However, the defendant stated that it would work out a financial plan to settle the outstanding sum due to the plaintiff. Based on the defendant's response, there is a clear admission of all that they still owe the plaintiff the outstanding amount as claimed and not simply evidence of some facts upon which the plaintiff relies to establish their cause of action. As there is no requirement of admissions to be pleaded, those admissions as per in their email exhibited as "JT15" is therefore binding against the defendant. See *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* (*supra*).

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[30] The defendant's averment that the communication under "JT15" is a "without prejudice" communication is to this court without merit as it was not expressly or by inference stated as such in the said email as required under s. 23 of the Evidence Act 1950. It is noted that the said admission was not part of a negotiation process between the parties but rather it was made in pursuance to the plaintiff's request for payment. Therefore, when this issue had arisen for the first time in the defendant's affidavit in opposition dated 9 December 2020 after the legal action is commenced against the defendant, it would smack as an afterthought. I therefore totally agree with learned counsel of the plaintiff that this contention was an afterthought.

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A [31] Although the defendant has raised various issues in the defendant's defence and/or counterclaim (as per in the amended statement of defence and counterclaims re dated 16 November 2020), I am of the view that those issues fall under "any other issues between the parties" for the purpose of O. 27 r. 3 ROC 2012. For those issues, the court may give such judgment as the court thinks just without waiting for determination of any question between the parties. Any other issues raised in the defendant's counterclaim is to be determined separately.

C [32] Based on the affidavit evidences before this court, the defendant has made unequivocal admission of the claims by the plaintiff and therefore I hereby allow this appeal and set aside the order of the learned Sessions Court Judge made on the 9 November 2021 with costs of RM3,000 subject to allocator fees.

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